

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

675
BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,057

VINCENT E. SCOTT,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal From the United States District Court
For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 30 1969

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July 30, 1969

QUESTIONS PRESENTED

1. Whether the court below, which failed to reduce Appellant's sentence after remand for resentencing by this Court, erred in ignoring the mandate of this Court.

2. Whether the Appellant was denied due process and equal protection by reason of the sentencing judge's failure to state reasons for reimposing the maximum sentence.

3. Whether the denial of Appellant's motion for assignment of resentencing to a judge other than the original sentencing judge constituted a denial of due process.

4. Whether Appellant was denied due process and equal protection by reason of the fact that he was given a more severe sentence than his co-defendant solely because he exercised his right to trial.

5. Whether this Court, in view of its familiarity with this case, the failure of the first remand and the long delay since Appellant's indictment, should undertake the sentencing of Appellant.

The pending case was previously before this Court under the title of Vincent E. Scott v. United States of America, No. 20,954, decided February 13, 1969.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,057

VINCENT E. SCOTT,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was charged with violation of 22 D.C. Code Section 2901 by an indictment filed in the United States District Court for the District of Columbia on November 1, 1965. He was tried before a jury on February 16-20, 1967, and found guilty. On April 7, 1967, he was sentenced to imprisonment for a period of not less than five years nor more than fifteen years, with the recommendation

that he be committed to an institution for youthful offenders.

Upon appeal, filed in the United States Court of Appeals for the District of Columbia on April 13, 1967, Appellant's conviction was affirmed on February 13, 1969, and the case was remanded to the District Court for resentencing. On April 17, 1969, the Court resentenced Appellant to imprisonment for a period of not less than five nor more than fifteen years. There was no recommendation that he be committed to an institution for youthful offenders.

Notice of appeal was filed on April 25, 1969. The jurisdiction of this Court is based upon 28 U.S.C. Section 1291 (1964).

REFERENCES AND RULINGS

There are no written rulings in which the court below set forth the basis of its orders presented for review by this Court. The Court is directed, however, to the statements of the sentencing judge found on pages 6 and 7 of the Transcript of Second Sentencing Proceedings, Thursday, April 17, 1969.

STATEMENT OF THE CASE

Appellant, Vincent E. Scott, and co-defendant Billy C. Alston, were charged with violation of 22 D.C. Code Section 2901, robbery, by an indictment filed in the United States District Court for the District of Columbia on November 1, 1965. Both defendants entered pleas of not guilty.

During the joint trial, the co-defendant Alston withdrew his plea of not guilty and entered a plea of guilty to the charge of robbery. Thereafter, the jury returned a verdict of guilty against Appellant as well.

Appellant was sentenced by the trial court on April 7, 1967. In view of the facts that: (1) the Court believed that Appellant lied on the stand; (2) Appellant had refused to plead guilty; and (3) Appellant still refused to confess to the alleged crime, the court imposed the maximum sentence upon Appellant, imprisonment for not less than five nor more than fifteen years, and recommended that he be committed to an institution specializing in youthful offenders.

Scott's co-defendant, Alston, was sentenced at the same hearing. During the hearing Alston attempted to withdraw his guilty plea on the grounds that he was innocent. Thereupon, the court asserted that it had planned to be lenient with him because of his guilty plea, but, since

he, too, was "deliberately lying," he would therefore receive the same sentence as Scott (S. Tr. 29).

Both defendants filed appeals. However, Alston's appeal was abandoned after he was resentenced by the trial court under the Federal Youth Corrections Act on June 23, 1967. At that time Alston's original sentence was vacated and, pursuant to 18 U.S.C. 5010(b), he was committed to the custody of the Attorney General and released 18 months later, on December 23, 1968.

Appellant Scott's appeal was prosecuted, and on February 19, 1969, his conviction was affirmed, this Court concluding that the proceedings prior to his conviction were free from error. However, the Court held that the factors considered by the sentencing judge violated Appellant's right to due process of law and put a "price tag" on his right to a fair trial and appeal. "(T)o the extent that the Appellant here received a longer sentence because he pleaded innocent" the sentence imposed on him was excessive. Scott v. United States, No. 20,954, decided February 13, 1969, ____ U.S. App. D.C. ____, ____ F.2d ____, at 14 (1969). Therefore, Appellant's case was remanded "for resentencing in accordance with the principles announced in this opinion." At 2.

On remand the case was again assigned to the original sentencing judge. On April 16, 1969, Appellant filed a motion in the District Court for reassignment of resentencing

to a judge other than the trial judge. In support of the motion, Appellant asserted that it would be humanly impossible for the trial judge to exclude from his mind and judgment all traces of the factors which were deemed improper by the Court of Appeals. The motion was denied by the original sentencing judge, who on April 17, 1969, again imposed the identical five-to-fifteen-year sentence but without recommending confinement in an institution for youthful offenders. Although he did not repeat the reasons held invalid by this Court, neither did he offer any other reasons for his action (S. Tr. Second Sentencing 6-9).

STATUTES INVOLVED

Title 18, Section 5010, United States Code, provides in pertinent part:

§5010. Sentence.

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this

chapter until discharged by the
Division as provided in section
5017(c) of this chapter

* * *

Title 28, Section 2106, United States Code, provides:

§2106. Determination.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Title 22, Section 2901, District of Columbia Code, provides:

§22-2901. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

STATEMENT OF POINTS

Appellant relies upon the following points:

1. The trial court erred in ignoring the mandate of this Court to reduce Appellant's sentence.

2. The trial court erred in failing to state its reasons for reimposing the maximum sentence on Appellant.

3. The trial court erred in denying Appellant's motion for a reassignment of resentencing to another judge.

4. The trial court erred in committing Appellant and his co-defendant to prison for disparate terms solely on the grounds that Appellant, unlike his co-defendant, exercised his right to a trial.

5. This Court should correct the improper sentence reimposed on Appellant.

SUMMARY OF ARGUMENT

I

This Court found that the sentence first imposed on Appellant by the District Court was attributable to three invalid criteria. The remand for resentencing therefore implicitly required that the sentence be correlatively reduced. That mandate was ignored when the district court instead summarily reimposed the same improper sentence and retracted its earlier recommendation for confinement in an institution for youthful offenders. This Court should now enforce its original mandate.

II

Appellant's sentence, unsupported by any stated reasons, must be vacated on two grounds. First, when a sentence which has been found impermissible is reimposed by the same court at resentencing, or when an even more severe sentence is ordered, it must be explained by criteria which disassociate it from the invalid rationale. Otherwise, as in Appellant's case, it still bears the taint of the original sentence since it has no discernible basis of its own.

Secondly, while courts of appeals may not review the severity of a sentence, they will review and insure the propriety of sentencing criteria. However, unless a record of these criteria is required, review can be only randomly obtained, as illustrated by Appellant's two appeals. Therefore, to guarantee all defendants equally the right to a fair and valid sentence, the trial court must state its reasons for a given sentence.

III

A judge who cannot objectively exorcise from his mind a belief which exerts an improper influence upon his discretion in a case before him must exclude himself therefrom to satisfy the requirements of justice, in fact

and appearance. Appellant's trial judge, evidently unable to set aside his belief in untenable sentencing criteria, should therefore have granted the motion to assign the resentencing of Appellant to another judge.

IV

At the first sentencing hearing, the trial court imposed the maximum sentence on Appellant's co-defendant, Alston, because the judge believed that Alston "deliberately lied" at allocution. However, this improper consideration, which thereby augmented his sentence, was subsequently eliminated when Alston's sentence was reduced. However, Appellant's sentence, imposed for the same improper reason, remains uncorrected. Because the disparity between the two sentences is attributable solely to an invalid consideration, they must be equalized.

V

This Court itself has the power to correct improper sentences. Because the first remand was fruitless, and because four years have lapsed since Appellant's indictment, and in view of this Court's familiarity with the case, the Court should exercise its power to correct Appellant's sentence.

ARGUMENT

I. The Trial Court Erred in Ignoring the Mandate of This Court to Reduce Appellant's Sentence.

(Sentencing Tr., First Sentencing, pp. 1-35; Sentencing Tr., Second Sentencing, pp. 7-9.)

In Scott v. United States, No. 20,954, decided February 13, 1969, _____ U.S. App. D.C. _____, _____ F.2d _____ (1969) (hereafter Scott I), this Court held that three factors were improperly considered by the trial court in sentencing Appellant: (1) that Appellant failed to confess at the time of allocution; (2) that the judge believed Appellant was guilty of perjury; and (3) that Appellant maintained his innocence, refused to plead guilty and insisted upon a trial. The Court stated that the first factor--failure to confess--put an unconstitutional price on an appeal. At 7. Secondly, prejudging Appellant guilty of perjury "plainly denied the Appellant [a] trial upon that offense." In any event, such guilt would be "an unpromising test of his prospects for rehabilitation." At 8. Finally, by holding Appellant's assertions of innocence against him, the trial court sacrificed his Fourth, Fifth and Sixth Amendment rights. At 9.

This Court concluded that the trial court had relied on these impermissible factors. Therefore, to the extent

that the maximum sentence of five-to-fifteen years imposed on Appellant was attributable to these factors, it should be correlatively reduced. However, like the Supreme Court in Yates v. United States, 356 U.S. 363, 366, 367 (1958), this Court "chose not to reduce the sentence but to leave this task, with gentle intimations of the necessity for such action, to the district court." Therefore, the case was remanded for resentencing--a judgment in which all three judges concurred--but no specific directions accompanied the mandate. On remand, as in Yates, "the district court appears not to have exercised its discretion . . . but, in effect to have sought merely to justify the original sentence." At 366. In both Yates and the instant case, the new sentence was a repetition of the old.^{1/}

As a concurring judge noted on the defendant's second appeal in United States v. Wiley, 278 F.2d 500, 504 (7th Cir. 1960), "consciously or not, the learned trial judge again applied the standard of his rule when he reimposed the 3-year sentence." "It is true," stated the majority in that case, "that in this language [of our previous opinion] there were no words of imperativeness. We

1. The new sentence imposed on Scott is actually more severe because of the sentencing judge's failure to recommend confinement in an institution for youthful offenders as had been done at the first sentencing.

pointed out that the severity of Wiley's sentence was irrelevant in our decision of that appeal. However, those views were purposely stated as an intimation to the district court." At 503 (emphasis added). Once again the court remanded.

Defiance need not be overt. Compliance with the letter of the mandate is insufficient if the prohibited effect is newly achieved. Thus, although the trial court here has gone through the gestures of resentencing, "all the reasons given for reversal of the judgment . . . in the first case, which we need not repeat, apply with equal force here." Ashcraft v. Tennessee, 327 U.S. 274, 279 (1944). The constitutionally offensive remarks by Appellant's trial court have been eliminated, but their effect is still felt in the five-to-fifteen-year sentence which was reimposed.

Responding to similar, covert defiance in Yates, supra at 366, the Supreme Court asserted that it had "no alternative except to exercise the supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the district court." Neither should this Court approve defiance by a lower court, for it is well established that a lower court cannot vary a mandate from an appellate court "or intermeddle with it,

further than to settle so much as has been remanded." ^{2/}
United States v. Howe, 280 F. 815, 820 (2d. Cir. 1922).

It cannot be doubted that this Court's mandate has been ignored by the district court, at the cost of Appellant's right to due process of law. This court, in Scott I, has once refused to condone the exercise of the sentencing power at such an expense. For the same reasons then expressed, it cannot do so now.

II. The Trial Court Erred in Failing to State Its Reasons for Reimposing the Maximum Sentence on Appellant.

(Sentencing Tr., Second Sentencing, pp. 7-9.)

- A. When a sentence which has been found improper is reimposed by the same court, it must be explained by criteria which disassociate it from the invalid rationale.

On Appellant's first appeal, this Court remarked that most often "the appellate court does not know whether the sentencing judge has performed his task thoroughly or well," due to the "frequent blankness of the record." At 4. Thus alerted, the sentencing judge herein has replaced his prohibited reasons with a blank record. No

2. When a district court attempts to settle more--or less--than required, the Supreme Court has concluded that "supervisory control of the district courts by the courts of appeals is necessary to proper judicial administration in the federal system." LaBuy v. Howes Leather Co., Inc., 352 U.S. 249, 259, 260 (1957).

reasons support the second sentence; no rationale distinguishes it from the first. As far as this record indicates, no new evidence was adduced to explain the court's action. Absent such an explanation, this sentence still bears the taint of the original sentence.

The Supreme Court has recently noted in North Carolina v. Pearce, 37 L.W. 4601, ____ S. Ct. ____ (1969), that the retaliatory motivations of a trial judge which result in a harsher sentence on remand from an appellate court are difficult to detect when no reasons accompany the action. "In the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities," a harsher sentence might well be warranted, the Court admitted. However, to assure that unconstitutional criteria which fetter a defendant's right to a fair trial and appeal are not concealed by silence, a harsher sentence on retrial must be explained. Otherwise, the Court will, in effect, infer the existence of unconstitutional criteria from the fact of a harsher sentence.

It is submitted that the same inference of invalidity is warranted by the blank record presented in this defendant's second appeal (hereafter Scott II). As this Court aptly remarked in Scott I, "it is important not only

that a trial be fair in fact, but also that the defendant believe that justice has been done." At 17. Vincent Scott has no reasonable grounds for such a belief. Neither does this Court.^{3/} "(O)ur system of law has always endeavored to prevent even the probability of unfairness To perform its high function in the best way 'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. 133, 136 (1959). The court in Baker v. State, 238 A.2d 561 (Ct. App. Md. 1968), implicitly recognized this principle when it remanded a case for resentencing where no explanation accompanied the sentence. "We cannot ascertain with certainty from the record before us whether the trial judge was influenced by such an impermissible consideration [Appellant's possible guilt in other burglaries] in fixing the length of the sentence," said the court. "If he was, and if any part of the sentence is attributable to his consideration of such data we think the Appellant would have been denied due process of law in the sentencing process" At 566 (emphasis added). Likewise, in Jones v. United States, 119 U.S.

3. In a defendant's eyes, the sentencing proceeding assumes a conspiratorial aura, intensified by the secrecy of the pre-sentence report. The suspicion aroused by withholding the report would be alleviated if sentencing criteria were disclosed.

App. D.C. 284, 342 F.2d 863 (1964), where there was even a possibility that the defendant's indictments had been based on confessions unlawfully obtained, this Court refused to affirm the judgments of the trial court because "(t)he record before us in the present case does not show, and the district court did not determine" what independent testimony supported the indictments. 119 U.S. App. D.C. at 294. This Court therefore remanded the case for an explanation.

It is impossible to conclude from the record that Appellant's sentence is a proper one: this Court "may not 'assume' that there are adequate reasons." Kent v. United States, 383 U.S. 541 (1966) (explanation required for waiver of jurisdiction by juvenile court). Indeed, the Pearce decision, supra, requires exactly the opposite conclusion, and consequently, that Appellant's sentence be vacated again.

B. The responsibility of an appellate court to review the propriety of sentencing criteria is meaningless unless the trial court states reasons for imposing a particular sentence.

As this Court observed in Scott I, at 2-3, the duty of an appellate court to review a sentence based on improper factors is unquestionable. See Townsend v. Burke, 334 U.S. 736 (1948) (sentence based on distorted

criminal record); United States v. Wiley, supra (sentence based on exercise of right to trial); Coleman v. United States, 123 U.S. App. D.C. 103, 357 F.2d 563 (1965) (sentence based on judge's belief in exacting death penalty); Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968) (sentence based on illegally seized evidence). But, "(m)eaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of reasons motivating [the decision]" Kent, supra at 561. Accordingly, unless the trial court is required to state the grounds for imposing a sentence, the power of the appellate court to review the propriety of these grounds is illusory. As the Supreme Court reasoned in Pearce, supra, only by assuring the visibility of impermissible criteria is their reviewability guaranteed.

It has been shown that substantial variation in sentences in the District Court for the District of Columbia is attributable to the difference in method of adjudication. "Thus [in 1964-1965], 53.4 percent of those convicted after a jury trial were sentenced to 5 or more years of imprisonment, while only 20.9 percent of those who pleaded guilty to the offense charged were so sentenced." Report of the President's Committee on Crime in the District of

Columbia, at 384-385 (1966). It cannot be known how many sentences of the 53.4 percent were imposed because a defendant maintained his innocence and sought the trial by jury to which he was entitled. Only in a random case, like Scott I, are those and other improper reasons discernible, for a blank record, as in Scott II, is inscrutable. When the right to appeal is available, the concepts of equal protection and due process require that it be accessible to all defendants on an equal basis. As a function of chance, this system of review offers no equality.

A defendant has a right to counsel at sentencing to insure due process of law. But to make this right meaningful, "that assistance [must] be provided in a context where it can be effective. Sentencing on the basis of undisclosed factual information is inconsistent with this objective." Verdugo, supra at 614 (concurring opinion) (emphasis added). Along with his right to remain silent and his right to a trial by jury, a defendant's right to counsel may thus be emasculated at sentencing.

The Supreme Court has declared that if a right is enforceable only through a procedural sanction, that sanction is "an essential ingredient of the right

To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." Mapp v. Ohio, 367 U.S. 643, 656 (1961). Cf. McNabb v. United States, 318 U.S. 332, 345 (1943). In this context, it has been effectively argued by academics and jurists that "the appellate court must be apprised of the facts on which the sentence was based if appellate review is to be meaningful." Note, Statutory Structures for Sentencing Felons to Prison, 60 COL. L. REV. 1134, 1165 (1960). "If the right to be sentenced on the basis of intelligible principles is to be enforceable, the principle must be articulated in a form which permits criticism and review." Note, Procedural Due Process at Judicial Sentencing for Felony, 81 HARV. L. REV. 821, 845 (1968). Almost twenty years ago, Judge Wyzanski wrote that "there is grave danger that a sentencing judge will allow his emotion or other transient factors to sway him. The strongest safeguard is to act only after formulating a statement of the considerations which he allows himself to take into account." A Trial Judge's Freedom and Responsibility, 65 HARV. L. REV. 1281, 1291 (1952). Judge Youngdahl, too, has agreed that "in the final analysis, a good sentence can be reasonably explained." Institute on Sentencing for United States District Judges, 35 F.R.D. 381, 388 (1964).

Finally, respecting sentencing legislation, Judge Sobeloff has testified: "It tends to assure against harsh and unreasonable sentencing if the judge has taken the trouble to examine the presentence report, to formulate his reasons, and to state them when the matter is fresh in his mind." Hearings Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary on S.2722, 89th Cong., 2d Sess., at 27 (1966).

In Congress, Senator Hruska introduced bills in 1965 (S.2722), 1963 (S.823) and 1962 (S.2879) for sentencing reform requiring that reasons accompany all sentences. These bills correspond to proposals made in both the ABA Project on Minimum Standards for Criminal Justice: Appellate Review of Sentences, Section 2.3 (April 1967), and the Model Sentencing Act, Section 10 (1963), drawn up by the Advisory Council of Judges of the National Council on Crime and Delinquency. But the requirement can properly come from the federal judiciary--the forum in which a defendant's right to due process and equal protection of law is ultimately enforced--through the use of the supervisory power, as Judge Sobeloff suggested in the Hearings, supra, at 27. Likewise, the ABA advises that judicial control over this procedure "may indeed be the most efficient means of dealing with the problem."

Appellate Review, supra, at 43. In Oregon, for example, the Supreme Court asserted that it could and would review a sentence only if the factors which "guided" the discretion of the sentencing judge appeared in the record on appeal. State v. Ridder, 185 Ore. 134, 202 P.2d 482 (1949).^{4/}

But, as Judge Sobeloff has concluded, "by one means or another, a well-managed court system ought to see to it that the reasons which prompted a sentence are made available." Hearings, supra, at 27. Not only consideration of sound management, but logic and justice demand that since the propriety of a sentence may be reviewed, its criteria must be recorded.

III. The Trial Court Erred in Denying Appellant's Motion for Reassignment of Resentencing to Another Judge.

(Appellant's Motion for Reassignment of Resentencing and Sentencing Tr., Second Sentencing, p. 6.)

At the first sentencing hearing, the sentencing judge declared that in imposing a harsher sentence on Appellant who persisted asserting his innocence, "I am doing what I think is right." (S. Tr. 20). Believing it would be humanly impossible for the original sentencing judge, or

4. The Oregon court was empowered by statute to review excessive, cruel or unusual punishments. Ch. 62, Oregon Laws (1945). The power which this Court has to review improper sentences is different in kind, but must likewise be carried into effect by requiring a record.

any judge, to set aside this deep belief in order to comply with the mandate from this court, Appellant moved to reassign the sentencing on remand. The sentence imposed after the motion was denied bears out the fear which prompted it.

In light of his unshakable belief, the decision on whether to reassign Appellant's sentencing was not discretionary. In Battaglia v. United States, 390 F.2d 256 (9th Cir. 1968), the sentencing judge wrongly relied on some data in the presentence report in evaluating the defendant's credibility at the time of sentencing. On appeal, the Ninth Circuit wrote that when "the judge discovers that he cannot avoid the consideration of [improper, undisclosed material] . . . the preservation of the proper image of justice requires . . . [that] [h]e should either excuse himself from conducting the hearing, or he should reveal the particular information" At 259. Appellant's sentencing judge likewise had two alternatives on remand. He could have followed the implicit mandate of this Court to reduce the sentence first imposed insofar as it relied on improper factors. Or, as requested by Appellant, he

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could have reassigned the proceeding.

As this Court wrote in Whitaker v. McLean, 73 U.S. App. D.C. 259, 118 F.2d 596 (1941), "the [trial] judge may, as indeed he insisted, have felt no hostility to the plaintiff, and in that view he was, subjectively, free from bias. But bias must be considered objectively." At the first hearing, Appellant's sentencing judge repeatedly insisted with increasing exacerbation, that he believed Appellant "deliberately lied in this case." (S. Tr., First Sentencing, 5, 7, 10). At resentencing he could scarcely expunge this belief: "Consciously or not, the learned trial judge again applied the standard of his rule when he reimposed the same sentence." Wiley, supra, at 504 (concurring opinion).

To avoid the "probability of unfairness" (Murchison, supra at 136), to "give assurance that [he is] . . . impartial, free . . . from any 'bias or prejudice' that might disturb the normal course of impartial judgment"

5. The fact that a judge has formerly tried a defendant for a different offense does not disqualify him from a subsequent proceeding. Smith v. United States, 360 F.2d 590 (5th Cir. 1966); United States v. Sansoni, 319 F.2d 586 (2nd Cir. 1963); Cox v. United States, 309 F.2d 614 (8th Cir. 1962). However, there was no evidence of actual bias--such as that in Scott I--in any of these cases. The resentencing of Vincent Scott required more of the original sentencing judge than complying with the directions of this Court as to questions of fact or law. Rather, in order to properly comply with this Court's mandate the original sentencing judge would have had to purge from his mind basic judgments which he heretofore had regarded as highly significant.

(Berger v. United States, 255 U.S. 222, 235, 236 (1920)), and to guarantee that the new sentence would be untainted by even the appearance of injustice (Whitaker, supra at 259), Appellant's motion to reassign the sentencing should have been granted.

IV. The Trial Court Erred in Committing Appellant and His Co-Defendant to Prison for Disparate Terms Solely on the Grounds That Appellant, Unlike His Co-Defendant, Exercised His Right to a Trial.

(Sentencing Tr., First Sentencing, pp. 1-35.)

At the first sentencing hearing, Appellant's co-defendant Alston received the maximum sentence after he attempted to change his plea from guilty to not guilty. The sentencing judge stated: "I was going to be a little bit lenient with Alston this morning but in view of his attitude and in view of the fact that the court feels he is deliberately lying to me . . . I am not going to give him any consideration, frankly." (S. Tr. 29.) Two months later, however, Alston was resentenced under the Federal Youth Corrections Act. Pursuant to 18 U.S.C.A. Section 5010(b), Alston was subsequently released after serving eighteen months.

Appellant's record is significantly different from that of his co-defendant only in that he consistently

maintained his innocence. The judge's expression of change of heart toward Alston during the first hearing clearly indicates the influence of that factor on his sentence. This Court declared this basis for sentence disparity unconstitutional in Scott I. The same situation arose in Wiley, supra, at 503, where the reviewing court pointed out that the district court "arbitrarily" sentenced one defendant more severely than his co-defendants. The Wiley court attributed the unjustifiable disparity to "the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his efforts prove unsuccessful." At 504. Cf. United States v. Russell, 285 F. Supp. 765, 770 (Pa. 1968).

While disparity between sentences for co-defendants is not per se unfair, it becomes so when the difference is attributable to improper criteria. Accordingly, to the extent that Appellant's sentence exceeded that of his co-defendant for such reasons, it is invalid, and must be reduced.

V. This Court Should Correct the Improper Sentence Reimposed on Appellant.

This Court has the power under 28 U.S.C.A. Section 2106 to correct the sentence imposed on Appellant which violated his right to due process of law. While courts

quite properly have been reluctant to exercise this power to modify sentences, they have done so where the lower court has abused its sentencing discretion. In Yates, supra, the Supreme Court reduced petitioner's sentence when, on remand, the lower court failed to do so. The Sixth Circuit has read Wiley and Yates "as holding that we have the power to set aside or reduce the severity of a sentence as an exercise of a federal appellate court's supervisory power over the administration of justice in the lower federal courts." United States v. West Coast News Co., 357 F.2d 855, 865 (6th Cir. 1966), rev'd on other grounds, 388 U.S. 447 (1968). See also United States v. Moody, 371 F.2d 688, 693 (6th Cir. 1967) (sentence for tax law violation reduced by 50%).

This Court in Coleman, supra, and Frady v. United States, 121 U.S. App. D.C. 78, 348 F.2d 84 (1965), cert. denied, 382 U.S. 909, reduced a death sentence to life imprisonment. In Coleman, the Court declined to remand to the sentencing judge because "clearly it would not be 'just under the circumstance' . . . or fair either to [the judge] or to appellant to require [the judge] to assume the burden of a third time and try to free himself of his firmly-held view, twice acted upon, that the death

sentence should be exacted." At 111-112. The same fair and sensible judgment should prevail in the instant case.

In Frady, supra, at 84, this Court remarked that life imprisonment was the sole alternative in resentencing the appellant on his first appeal, but declined to decide if it would remand if a greater range existed for discretion. The instant case is before this Court on a second appeal. The reservation in Frady should not, therefore, be applied here since remand has already proved fruitless.^{6/}

Moreover, in view of the time lapse of almost four years since Appellant's indictment, in addition to this Court's familiarity with Appellant's case, it is submitted that Vincent Scott's sentence can most appropriately be corrected here.

CONCLUSION

The District Court erred when it failed to reassign the resentencing of Appellant. Refusing to do so, it then ignored the mandate from this Court by reimposing the same maximum sentence upon Appellant and directing that

6. A second appeal was involved in Coleman, supra, and the Court relied on the Frady opinion in reducing a death sentence to life. Since the alternatives in Coleman were the same as in Frady, it was unnecessary to consider the fact of a second appeal as an independent variable.

it be served under more difficult conditions than the original sentence. This Court is therefore requested to vacate the sentence thus imposed.

The failure of the trial court to state its reasons for the new sentence violated Appellant's Fourth, Fifth, and Sixth Amendment rights which this Court sought to protect on the first appeal. Moreover, it stultified the power of review. Unsupported by independently valid reasons, this sentence is indistinguishable from the first, and must likewise be vacated. Finally, the disparity between Appellant's sentence and that of his co-defendant is solely a function of the improper factors considered by the sentencing judge, and therefore requires correction.

For these reasons, Appellant's sentence should be vacated, and a new sentence imposed by this Court. In the alternative, the case should be remanded for resentencing by a newly designated judge.

Respectfully submitted,

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July 30, 1969

RECEIVED

NOV 3 1969

CLERK OF THE UNITED
STATES COURT OF APPEALS

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,057

VINCENT E. SCOTT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court

For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 3 1969

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November 3, 1969

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,057

VINCENT E. SCOTT,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLANT

I.

The United States has taken the position that the reimposition of the original sentence upon the Appellant, without explanation, is totally consistent with the decision of this Court in Scott I.

Appellant does not claim to know "or even to suggest, what the sentence should be after remand," any more than this Court did. (Brief for Appellee, at 4; hereafter "Br. A.") But unless we are to consider the action of this Court in Scott I a mere charade, we must believe that the mandate of this Court required that the sentence be reduced.

Both Appellant and this Court understood that the first sentence had been increased to penalize Appellant for standing trial and for maintaining his claim of innocence. Only a reduction in the sentence can indicate that this unconstitutional element has been eliminated.

The United States asserts that Appellant has wrongly inferred prejudice "from the subjective views of the judge." United States v. Bolden, 355 F.2d 453 (7th Cir. 1965). We emphasize again, however, that the basis for this appeal is not what the sentencing court said, believed or felt in Scott II, but what the court did in fact. On the basis of its actions alone we can discern no constitutional difference between the two sentences.

The United States attempts to distinguish Yates v. United States, 356 U.S. 363 (1958), from the instant case. It claims that the trial court in Scott II did not seek to justify the original sentence which he reimposed (Br. A. 7). But the Supreme Court in Yates looked to the "effect" of the second sentence which, by the mere fact of its repetition, was a justification of the first. The Supreme Court referred to no language of the trial court upon resentencing but, as Appellant does in the instant case, pointed solely to its action which could not be condoned.

II.

The United States maintains that North Carolina v. Pearce, 395 U.S. 711 (1969), is not bearing on this case. Appellant believes that the United States has misunderstood the rationale of the Supreme Court's holding in Pearce (Br. A. 7-9). In that case the Supreme Court held that reasons for the increased sentence must appear in the record not because there was actually some demonstrable impropriety, but to insure that "the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." At 726. Appellant contends that this rationale is, at the very least, equally applicable to cases where a sentence known to be constitutionally infirm has been reimposed. Absent stated reasons, it must be presumed that the defect still exists.

Further, it would in no way enlarge upon "the obligation of the appellate court to review the sentencing process" (Br. A. 9) to require the trial court to state reasons for all sentences. The reviewing court would still look only at the constitutionality of the factors, not the severity of the result. The requirement simply would insure the right of a defendant to a constitutional sentence, and guarantee that review of constitutionally improper sentences would not be confined only to occasional or accidental cases.

III.

The United States wrongly assumes that the Appellant could move to reassign the resentencing only by filing an affidavit of bias and prejudice under 28 U.S.C. §144. Clearly, the motion which Appellant filed the day before resentencing was not an affidavit of bias and prejudice. The object of the motion was neither so broad nor presumptuous. Instead, the thrust of the motion was to assert that compliance with the mandate of the Court of Appeals required reassignment: It was Appellant's purpose to recall to the Court the difficulties inherent in the case on remand, and thus to avoid any appearance of impropriety or unfairness. The facts which we brought before the Court at that time were particular opinions of record which the Court held. As such, the motion was totally consistent with the requirements of Rule 47 of the Federal Rules of Criminal Procedure.

The United States also complains that the motion was not filed five days before the resentencing. Appellant, however, was notified of the resentencing only forty-eight (48) hours before it was to take place. The motion to set the resentencing before a different judge was filed less than twenty-four (24) hours after notice was received. At the resentencing hearing the United States raised no objections either to the time of filing or the form of the motion.

IV.

It readily appears in the record in Scott I that the sentence of Appellant's co-defendant, Alston, was increased because he tried to withdraw his guilty plea (S. Tr. 29). The fact that the trial court later reduced Alston's sentence significantly suggests that the trial court fairly reconsidered its earlier rationale. We suggest that the decrease in Alston's sentence eliminated the unconstitutional criterion which had entered the court's earlier judgment. Accordingly, the difference between the sentences imposed on Alston and Appellant can be attributed to the constitutional defect inherent in Appellant's sentence still. Appellant requests only that he receive the same protection under the Constitution which Alston in effect obtained, and which he has been denied.

V.

Appellee has agreed that this Court has the power to resentence Appellant (Br. A. 14-15). We believe that this Court should exercise this power, and thereby accord to Vincent Scott the rights to a just sentence which, after over four years, he has not yet received.

CONCLUSION

It is respectfully requested, therefore, that this

Court grant the relief requested in Appellant's original
brief.

Respectfully submitted,

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November 3, 1969.

REPLY BRIEF FOR APPELLANTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,069
No. 23,070

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIE A. ROBBINS,
NATHANIEL HAIR,
Appellants.

ON APPEAL FROM JUDGMENTS OF
CONVICTION IN THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 20 1970

Nathan J. Paulson
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January 20, 1970

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Wilcox v. United States, 387 F.2d 60 (5th Cir. 1967)

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*McCormick, Evidence (1954)

* Cases or Authorities chiefly relied upon are marked by asterisks.

ISSUE PRESENTED

The following issue is presented in reply to appellee's response to argument II of appellants' opening brief on appeal:

Whether the concededly hearsay testimony of a witness that an unidentified stranger told the police that the three robbers had gotten away in a white convertible was not admissible as a "spontaneous declaration" and was critically prejudicial.

This case has not previously been before this Court, except on appellants' motions for bond pending appeal, and on the opening briefs on appeal to which this is appellants' reply, and on appellants' motion for an extension of time to and including January 20, 1970 within which to file this reply brief--granted January 7, 1970.

REFERENCES AND RULINGS

In this reply brief appellants cite no transcript references or lower court rulings, those listed in appellants' opening brief on appeal constituting the necessary background.

STATEMENT OF THE CASE

Appellants' opening brief, setting forth the facts and jurisdictional basis of this Court, raising five issues on appeal was filed with this Court on October 15, 1969.

The appellee's brief was filed December 19, 1969.

By order dated January 7, 1970, this Court granted appellants an extension of time to and including January 20, 1970 within which to file a reply.

Appellants hereby reply to one response made by appellee to argument II in appellants' opening brief on appeal, dated October 15, 1969.

ARGUMENT

- II. The Concededly Hearsay Testimony of a Witness That an Unidentified Stranger Told the Police That the Three Robbers Had Gotten Away in a White or Light Convertible Was Not Admissible As a "Spontaneous Declaration" and Was Critically Prejudicial.

It is literally hornbook law that:

In criminal cases, the arresting or investigating officer will often explain his going to the scene of the crime or his interview with the defendant, or a search or seizure, by stating that he did so 'upon information received' and this of course will not be objectionable as hearsay, but if he becomes more specific by repeating definite complaints of a particular crime by the accused, this is so likely to be misused by the jury as evidence of the fact asserted that it will be excluded as hearsay.⁸ [citing first among others: Smith v. United States, 105 F.2d 778, syl. 1 (Ct. App. D.C. 1939)]^{1/}

This Court succinctly stated the law for the District of Columbia in Smith v. United States, 70 App. D.C. 255, 256, 105 F.2d 778, 779 (1939): "The rule seems to be that, while an officer may testify before a jury that, acting upon information, he did certain things, he may not go further and testify as to precisely what he was told about the particular place or the particular person." Here a police officer (Officer Howe) and a witness (Harold Kramer) testified over objection that an unknown and unidentified stranger

^{1/} McCormick, Evidence §227 at 463 (1954). Accord: Wilcox v. United States, 387 F.2d 60 (5th Cir. 1967); McMillian v. United States, 363 F.2d 165 (5th Cir. 1966); Landsdown v. United States, 348 F.2d 405 (5th Cir. 1965); Abrams v. United States, 117 App. D.C. 200, 327 F.2d 898 (1964); Leigh v. United States, 113 App. D.C. 390, 308 F.2d 345 (1962); Mattson v. United States, 7 F.2d 427 (8th Cir. 1925); Bolt v. United States, 55 App. D.C. 120, 2 F.2d 922 (1924).

approached them and said that the three men who had robbed the post office had fled in a white convertible and headed west on Rhode Island Avenue.

The government contends broadly that although this was hearsay, it was admissible as some sort of spontaneous declaration exception to the exclusionary rule. As Judge Burger noted in a case upon which the government relies--Wabisky v. D.C. Transit System, Inc., 114 U.S. App. D.C. 22, 309 F.2d 317 (1963)--there are at least four distinct exceptions encompassed by this term [there phrased as "Res Gestae"]:
"(1) declarations of present bodily condition; (2) declarations of present mental state; (3) excited utterances; (4) declarations of the present sense impression."^{2/}

Looking with particularity at the possible categories of "spontaneous utterances," it is apparent that the only one the government could be contending for here would be the "excited utterance" exception. This is confirmed by the only three cases upon which the government relies: United States v. Kearney, D.C. Cir. No. 22,411 (August 15, 1969); Jackson v. United States, 123 App. D.C. 276, 359 F.2d 260 (1966); and, Wabisky v. D.C. Transit, Inc., 114 App. D.C. 22, 309 F.2d 317 (1963). Each of those cases dealt with an "excited utterance." Each emphasized that the out of court declarant: "seemed to be very upset"

^{2/} McCormick, Evidence (1954) at 561 reflects this same conceptualization subsuming the categories noted above under the rubric of "spontaneous utterances."

(Wabisky, supra); was "yelling and calling" (Jackson, supra); or was a dying policeman (also, a "trained observer") whose "lack of motive to lie is underscored by the fact that he apprehended that his injury was serious. . ." (Kearney, at 9 supra).

There is no evidence in the record to support a conclusion that the declarant in this case was in any way "excited." There is no suggestion that he was even a victim of the robbery. There is no reason to believe he was a trained observer and certainly no suggestion that he was dying. The court below made no inquiry whatsoever into the circumstances surrounding the volunteering of this statement, or the emotional state of the declarant. The police did not obtain his identity, and none was volunteered. The only circumstance which was apparent was that the statement was made within minutes after the robbery. That single fact does not tend as the government suggests in quoting from Kearney ". . .to support the likelihood of accurate recollection, and to mitigate the possibility that truth was undercut by speculation or fabrication."^{3/} When hearsay is offered as coming within an exception to the exclusionary rule, the declarant must be known to have met the basic knowledge, qualification and ability to perceive requirements. [McCormick, Evidence §226 at 462 n.3 (1954)]. Here

^{3/} United States v. Kearney, supra, 9; Appellee's Opening Brief, December 19, 1969, at 7.

there is no information as to the observer's ability to perceive what he claimed to have seen and no knowledge of his reliability.

In fact, his proximity to the scene would suggest that he was himself involved in the robbery and was dispassionate and intentionally fabricating a false lead. No one else saw three men get into a white convertible.

In this regard, the government boldly concludes that even if the statement were improperly admitted, it caused no prejudice because the appellant Robbins was identified by one witness, because appellant Hair was found in the get-away car and because the idea that the police were looking for a white convertible would have come in anyway, later.

Of course, if the Court had properly excluded the testimony in the first instance, it would not have come up again, either through witnesses or counsel. Moreover, although appellants contend that speculations as to what weight a jury might have put on certain evidence had other evidence been excluded, is too much with which to burden an appellate Court, and accordingly the case should be reversed, it seems clear that in the absence of testimony to the effect that a supposed witness claimed the robbers would be found in a white or light car, the jury would have given greater weight to appellants' story which depended on believing that their car was not the get-away car.

The appellants' defense is therefore inextricably entwined with the facts immediately subsequent to the robbery. The government's contention that the unverified statement by a supposed but unidentified witness, not subject to cross examination, that the three robbers would be found in a white convertible was not damning is egregiously untenable speculation. There was no other evidence against appellant Hair than his presence in that car. The stranger's statement was no different from an informer describing the guilty participants and their whereabouts. Thus, it was highly prejudicial and not merely cumulative of other strong evidence.^{4/}

^{4/} See *Dallago v. United States*, D.C. Cir. No. 22,174 (November 7, 1969) where at slip page 22 the Court noted the jury (as is analogous to the case here) "had to find appellant guilty, if at all, on the basis of inferences permitted but not compelled by circumstantial evidence."

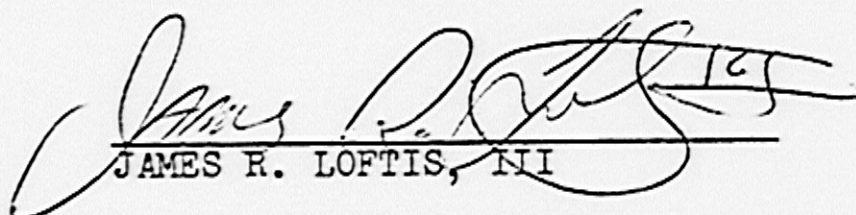
CONCLUSION

In conclusion, for the reasons stated above appellants respectfully submit that their convictions should be reversed and the case remanded with instructions to dismiss the indictment.

Dated: January 20, 1970

Respectfully submitted,


DANIEL H. MARGOLIS


JAMES R. LOFTIS, III

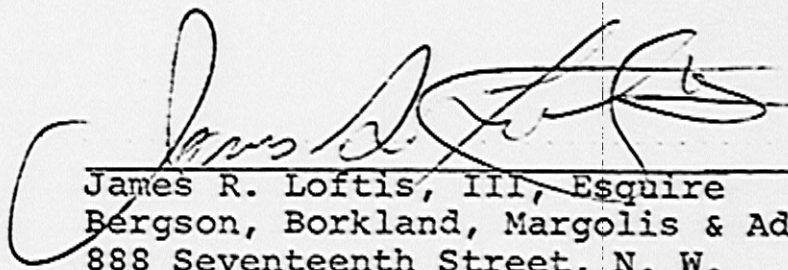
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 1970,
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United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 16 1970

PETITION FOR REHEARING

Nathan J. Paulson
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,070

UNITED STATES OF AMERICA,

Respondent-Appellee,

v.

NATHANIEL HAIR,

Petitioner-Appellant

PETITION OF APPELLANT-DEFENDANT
NATHANIEL HAIR FOR REHEARING

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June 16, 1970

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U.S. App. D.C. 9, 347 F.2d 793 (1965 cert.
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* Pendergrast v. United States, U.S. App. D.C. ___, 416 F.2d 776 (1969).	4, 5
* Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967)	3, 4

* Cases chiefly relied upon are marked by asterisks.

(ii)

THE ISSUE PRESENTED

Whether upon further consideration this Court should grant a rehearing and reverse because by affirming without opinion petitioner's (appellant-defendant) conviction of robbery and assault on a person having charge of mail matter where no proceeds of the robbery were found in his immediate possession, where not one of the seven eye-witnesses identified him, and where he was not found at the scene, but where the case was submitted to the jury on the theory that an inference could be derived from exclusive possession of recently stolen property, and where the government conceded in oral argument that since there was no direct evidence against petitioner its case was based on an inference derived from the "association" of petitioner and his co-defendant, this Court failed to apply the standard of Goodwin v. United States, 121 U.S. App. D.C. 9, 347 F.2d 793 (1965) cert. denied, 383 U.S. 855 (1966) and erroneously sanctioned the substitution of guilt by association for guilt based on a rational inference which might be derived from exclusive possession of recently stolen property.

(iii)

This case has been before the Court:

(1) On appellant's motion for bond pending appeal dated December 2, 1960; and,

(2) On appeal, on appellant's brief dated October 15, 1969, on appellant's reply brief dated January 20, 1970, and on oral hearing on May 22, 1970; and,

(3) By order dated June 3, 1970, affirming appellant's conviction.

REFERENCES AND RULINGS

In this petition for rehearing, petitioner cites no references or rulings other than this Court's Order (no opinion) dated June 3, 1970 affirming the conviction, petitioner-appellant's opening brief on appeal and reply brief constituting the necessary background.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Nathaneil Hair, the defendant-appellant above named, by his court-appointed counsel presents this, his Petition for Rehearing in the above entitled cause, and respectfully urges that a Rehearing be granted and that upon further consideration the judgment of the District Court be reversed.

STATEMENT

Petitioner (appellant-defendant) was convicted in the District Court for the District of Columbia of robbery and assault on a person having charge of mail matter. On appeal to this Court he argued inter alia that his case was improperly submitted to the jury with an instruction that an inference of guilt could be derived from the unexplained possession of recently stolen property and that the evidence was insufficient to support a finding of guilt beyond a reasonable doubt. In its brief the United States conceded that its case against petitioner Hair was based on inference. During oral argument, in response to questions from this Court, the United States contended that the evidence against petitioner Hair was sufficient since he was "associated" with co-defendant-appellant Robbins, against whom the evidence (including an eye-witness identification) was overwhelming.

Petitioner was arrested in the backseat of a car in which proceeds of the robbery were found. Petitioner swore he was innocent and that he entered the car when offered a ride distant in time and place from the robbery. A police officer testified that he had the car under observation for all but a short time which he estimated as twenty seconds but which was by his testimony necessarily the equivalent of the time required to circle an entire city block at normal speed. Petitioner testified he entered the car at that point. He was not identified by any of the seven eye-witnesses. He had no proceeds of the crime in his possession. He was not placed at the scene.

This Court affirmed petitioner's conviction by order dated June 3, 1970 without opinion.

ARGUMENT

IN AFFIRMING PETITIONER-APPELLANT'S CONVICTION WITHOUT OPINION, THIS COURT FAILED TO FOLLOW THE STANDARD OF GOODWIN V. UNITED STATES, 121 U.S. APP. D.C. 9, 347 F.2d 793 (1965) CERT. DENIED, 383 U.S. 855 (1966) AND SANCTIONED A NOVEL APPLICATION OF THE FALLACIOUS THEORY OF GUILT BY ASSOCIATION

In affirming the conviction herein, this Court failed to apply the standard established in Goodwin v. United States, 121 U.S. App. D.C. 9, 347 F.2d 793 (1965) cert. denied, 383 U.S. 855 (1966) and erroneously held that petitioner-appellant Hair's "association" with co-defendant Robbins supplied probative

evidence of guilt beyond a reasonable doubt and filled the interstices evident in the government case by its own admission that its case was based on inference [Appellee's Brief at 8] and by petitioner's sworn innocence, lack of possession of any of the proceeds of the robbery, lack of identification by any of the seven eyewitnesses and failure to be placed at the scene of the robbery.

APPELLANT HAIR DID NOT HAVE EXCLUSIVE POSSESSION
OF RECENTLY STOLEN PROPERTY

In Goodwin, supra, as in the instant case, a co-defendant was not shown to be at the scene of the robbery, was not identified by anyone, and denied participation in the crime although he was arrested while a passenger in a car in which proceeds of a robbery were found.

In the instant case the United States argued that Goodwin was distinguishable. Citing Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967), it suggested that where proceeds of a robbery are not found on an accused but in a car near him, they may be attributed to his possession. [Appellee's Brief at 10] But in Bailey, supra, the converse was found controlling: "second, and more important, each of the appellants was found with what was almost certainly part of the loot in his immediate possession. This was not true in Goodwin, where all the money was found in a plastic bag on the floor of the

car and where there was no evidence that Paul Vaughn was going to participate in its distribution" (Bailey, supra at 310), In the instant case, as in Goodwin, the proceeds of the robbery were found in the car, not in appellant Hair's possession.

AN INFERENCE OF GUILT MAY NOT BE DERIVED FROM
ASSOCIATION WITH ONE WHO POSSESSES RECENTLY
STOLEN PROPERTY

Petitioner Hair does not attack the hoary inference which might be derived from exclusive possession of recently stolen property; but, rather, the novel theory of basing such an inference on "association" with one who possesses stolen property. The government conceded that in the absence of direct evidence, it had to rely on inference to convict appellant Hair [Appellee's Brief at 8]. In the absence of actual immediate possession -- the critical underpinning of the inference to be derived from exclusive possession of recently stolen property (Pendergrast v. United States, U.S. App. D.C., 416 P.2d 776, 787 (1969) -- and as this Court indicated during oral argument of this cause, reliance for inference of guilt was therefore necessarily placed on association.

But for purposes of instructing the jury and permitting a conviction based on inference to stand, mere association is not the equivalent of exclusive possession. In Pendergrast, this Court stated:

"The inference is indulged only where the accused is found in exclusive possession of property recently stolen and the possession is not otherwise explained. The inference is then permitted because its factual prerequisites, if competently established, support a logical deduction that the possession of the stolen property could have been acquired only by the possessor's theft of that property. To so infer 'is but to accord to the evidence, if unexplained, its natural probative force.'" [Citations omitted] [Pendergrast, supra, at 787].

In the instant case, petitioner-appellant Hair testified that distant and subsequent to the robbery appellant Robbins offered him a ride. While the police described the short time during which this might have transpired as being only 15 or 20 seconds it was at least long enough to go around an entire city block at normal speed, long enough for petitioner-appellant Hair to get in the car. Whether or not the jury was favorably impressed with petitioner-appellant Hair's corroboration of appellant Robbins' version of the facts is irrelevant for it added nothing probative to the evidence against petitioner-appellant Hair. Even assuming the "association" was not explained to the jury's satisfaction, the "natural probative force" of being in a car with recently stolen property and with someone else who possessed stolen property, is not proof of guilt of robbery or assault on a person having charge of mail matter beyond a reasonable doubt. Mere association is not enough. There was no evidence supporting an inference